UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

A & B SHEET METAL, INC.

and

Cases 10–CA–108107
10–CA–108115

SHEET METAL WORKERS LOCAL UNION 85

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for the General Counsel.
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(Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.), for the Respondent.
James Jackson,
for the Charging Party.

DECISION

Statement of the Case

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Atlanta, Georgia, on January 27, 2014. The union filed both charges on June 27, 2013, and the General Counsel issued the complaint on September 27, 2013.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it issued rules prohibiting discussion of the union with other employees and prohibiting organizing activities. It also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it terminated Thomas Hardman's employment on June 25, 2013, due to his support for the union and his organizing activities.[1] The Respondent filed an answer, denying all material allegations.

[1] An allegation that the Respondent interrogated Hardman about his union activities was withdrawn August 27, 2013.

After the trial, the General Counsel and the Respondent filed briefs,[2] which I have read and considered. Based on the entire record in this case, including my observation of the demeanor of the witnesses,[3] I make the following

Findings of Fact

I. JURISDICTION

The Respondent operates a business in Forest Park, Georgia. Annually, the Respondent performs services outside the State of Georgia valued in excess of $50,000. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent fabricates, installs, and sells sheet metal products to the wholesale market. Thomas Barber is the owner and president of the company; Crystal Johnson is the general manager. There are two project managers, David Woodruff and Mike Mosley, who are in charge of the employees in the field, ensuring that they have necessary supplies and that the jobs are completed on time and under budget. (Tr. 59.) Reporting to the project managers are the foremen, who directly oversee the work.

The Respondent's employees are not unionized.

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[2] The Respondent moved to dismiss the complaint, contending that the National Labor Relations Board and its agents and delegates have no authority in this matter, arguing that two former Board Members were illegal appointees under the rationale set forth in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013). The Respondent asserts that the January 2012 recess appointments of Block and Griffin were illegal and thus there was no quorum on the Board at the time that this case was initiated, and therefore the Board had no authority to engage in the enforcement proceedings. The circuits are split as to the validity of the recess appointments and the matter is currently pending before the U.S. Supreme Court. The Board has rejected the *Noel Canning* holding. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013). Therefore, the Motion to Dismiss is denied.

[3] In making my witness credibility findings, I considered their demeanor, the content of their testimony, and the inherent probability of the testimony given the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951); *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

B. Hiring of Thomas Hardman

The Charging Party, Thomas Hardman, applied for employment with Respondent in response to a May 2013 advertisement on Craigslist for a sheet metal worker. Hardman was a journeyman with extensive experience in that field, as a member of Sheet Metal Workers Union Local 85 for 7 years.

Hardman's Version

General Manager Johnson invited Hardman to come to the office for an interview. Hardman testified that, in that meeting, they discussed the union. He said that Johnson told him that she liked his resume but noticed his strong ties to the union and was hesitant to hire him because she had never hired anyone with such close ties to the union. She advised him against telling the union he would be working for A & B, but he told her that he was under contract with the union and had to tell them. She said there would be no salting and no organizing, and that she didn't want the other employees to know he was in the union since they had already voted and decided they did not want a union. (Tr. 15–16.) Hardman said that he told her he had been laid off for 4 months and really wanted to work, and that he was there to work. He testified that she said he had great potential to go far with the company. She sent him to the conference room to complete some paperwork while she went to confer with President Barber. Johnson returned with Barber, who shook Hardman's hand and also said that he liked Hardman's resume. Barber reiterated that there would be no organizing or salting by Hardman. (Tr. 17.)

The following day, Hardman had his pre-employment drug test and returned to the office to complete the hiring process. He watched a video in Johnson's office as part of his orientation. Johnson reviewed company policies with Hardman on areas such as safety, the dress code, protocols, and benefits, and she repeated that there would be no union activity, no organizing, and no salting. Hardman signed the new hire check-off list (R. Exh. 1), but testified that the "Xs" crossing out the benefits sections were not on the form when he signed it, nor was the word "temporary" at the top of the sheet. (Tr. 145–146.) He said Johnson told him that he would be placed on a 90-day probationary period, that could be shortened, depending on his performance. He said she never told him he was a temporary hire. (Tr. 18.)

Johnson's Version

Johnson had a different account of Hardman's hiring. She said she had advertised for temporary help for the summer rush, not for permanent positions. (Tr. 107–108.) Hardman responded to the ad and she invited him to come to the office for an interview on May 13, 2013. She reviewed with Hardman his experience, skills, and prior employment, as he reported them on his resume. (Tr. 106.)

Johnson testified that Hardman told her he was under contract with the union, so she asked if the contract permitted him to work for a nonunion company, like A & B. He said that there was a prohibition against it, but that the union was not enforcing that provision as so many union members were out of work. (Tr. 109.) She said they also discussed the temporary nature of the job. Hardman said temporary work was acceptable because he was unemployed and needed a job until he decided whether to leave the union or was recalled to work by the union. (Tr.

108.) She testified that she said nothing about engaging in union activity and nothing about salting at A & B. (Tr. 109.)

She found Hardman to be well-qualified so she conferred with Barber and told him that Hardman would be a good fit, especially for the Plant Bowen project. (Tr. 110.) Barber agreed, so Johnson offered Hardman a temporary position and sent him for drug testing.

Hardman returned the following day with his drug test results and Johnson proceeded with new employee orientation, where she reviewed the employee manual. (Jt. Exh. 4; Tr. 110.) She told him, as is her standard practice, that employment is at will, that A & B is a merit shop, and she discussed full time versus temporary positions. (Tr. 111.)

Project Managers Woodruff and Mosley were at the office, so Johnson brought them in and introduced them to Hardman. She wrote their names and telephone numbers on a business card for Hardman, and explained their roles to him. She advised Hardman to go to his foreman first, then to the project manager, with any issues that may arise. (Tr. 60, 111–112.) The project managers welcomed him, then Mosley left. Woodruff stayed while Johnson reviewed the remainder of the employee manual. Johnson testified that she advised Hardman, per section 4.11 of the employee manual, that solicitation was not permitted during work hours or in the work space. (Jt. Exh. 4, pp. 26–27; Tr. 112–114.) She said that Hardman then asked if that meant organizing or salting, and Johnson said that union activity could be conducted on breaks, lunch, or before or after work, but not on worktime. She did not say there was a prohibition against union activity; she said the nonsolicitation policy covers any kind of solicitation. (Tr. 114.) Johnson gave Hardman a copy of the employee manual. (Tr. 143–144.)

Johnson had Hardman sign the new hire check-off list (R. Exh. 1), confirming that she had covered those topics. (Tr. 139.) She said she did not tell Hardman that he would have a 90-day review, although it is on the form. (Tr. 140.) Johnson testified that Hardman asked whether he could be hired permanently, because he had been out of work for so long and that period of unemployment had caused him a financial burden. He elaborated that he felt the union had not called him to work because he wasn't in the "clique." (Tr. 115.) Johnson replied that only temporary work was then available, but if permanent positions opened, they would be filled based on the employee's work ethic. (Tr. 116.) Johnson testified that the form was completed by her and then signed by Hardman, in its current state. (Tr. 139.)

Woodruff's Version

Woodruff was present for only a portion of the orientation. He testified that Johnson covered the solicitation policy in his presence. She told Hardman he could do whatever he wanted during breaks, lunch, or before or after work, but that he was expected to work when on the clock. (Tr. 61.) She did not discourage salting or organizing off the clock while he was present. (Tr. 62, 64.)

Woodruff then explained the job expectations to Hardman, and he did not mention union activity or organizing. (Tr. 62, 63.)

Barber's Version

Barber testified that he was introduced to Hardman by Johnson, and welcomed him aboard. He testified that he said something to the effect of "you realize that we're a nonunion company and we want to keep it that way." (Tr. 51.) He did not forbid salting and never engaged in a conversation about organizing with Hardman.

Credibility Findings

I credit the Respondent's witnesses and, most importantly, Johnson's and Barber's accounts of what was said to Hardman at the time of his hiring. Overall, Hardman was a very weak witness, lacking in reliability. His testimony on critical points was often vague, general, and perfunctory, without detail or context. At times, he claimed not to recall what was said, or his testimony could be inconsistent, changing from not recalling to admitting a fact. At other times, he would recite only a portion of a statement or conversation, not the complete statement. Further, Hardman's testimony was not corroborated in any respect by any other witness. Additionally, Hardman did not report Johnson's or Barber's alleged statements to anyone at A & B, although he knew some of the other employees from the union and past jobs. (Tr. 26.) Regarding the alleged statements by Johnson and Barber, he said simply that they directed him not to salt or organize. He did not give any context for the alleged statements. Johnson, on the other hand, reported fairly specifically on their conversations and placed them in context, making her version more plausible. I find her to be a reliable witness, as she was consistent and sincere, in addition to providing detailed descriptions of events. Johnson's testimony regarding her statements about solicitation at Hardman's orientation was supported by Woodruff, who was a credible witness. Hardman did not rebut Woodruff's testimony as to what was said in his presence; Hardman merely stated that Johnson had made the statements earlier. Since she had not covered the nonsolicitation policy before Woodruff's arrival, Hardman's lack of context for the alleged statements, as well as the fact that he apparently did not challenge her explanation of the nonsolicitation policy in Woodruff's presence or request clarification at that time of her earlier proscription against union organizing, render his testimony less credible. Johnson's version is more probable, and the comments she and Hardman made, as well as their subsequent actions, make sense if her account is credited. I also credit Barber's testimony and find him to be a reliable witness, as he was straightforward in his testimony.

Hardman's claim that Johnson told him she was reluctant to hire someone with such strong union ties is not credible. It was never explained what those "strong" ties were; Johnson had hired many other members of Local 85 in the past. (Tr. 109.) Hardman's claim that Johnson told him not to tell other employees that he was a member of the union likewise is not credible, given the fact that many of Respondent's employees were or had been members of Local 85. Hardman's testimony that Johnson used the term "salting" before he did is also incredible. (Tr. 155.) Johnson was not familiar with unions and organizing terms, and did not know what the word meant. She credibly testified that the first time she had heard the word was when Hardman used it at his orientation. (Tr. 138.) I also reject Hardman's testimony that Johnson hired him for a permanent position. Johnson testified regarding Hardman's statements about the hardship unemployment had caused him, his satisfaction with temporary work at A & B due to his current

ambivalence about the union, and his inquiry about obtaining a permanent position, that only make sense if he had been hired as a temporary.

I find that Johnson did not prohibit union activity, salting, or organizing and did not prohibit discussing the union. Specifically, I find that, at Hardman's orientation, Johnson advised Hardman that no solicitation of any kind was permitted during work hours or on Respondent's premises, in accordance with the company's employee manual. When Hardman asked about union organizing, she told him the policy was not limited to union organizing, but covered all types of solicitation. She further told Hardman that union activity could be conducted on breaks, lunch, or before or after work.

I further find that Barber told Hardman that the company was nonunion and he wanted it to stay that way. He did not say anything about, nor prohibit, salting or organizing.

C. Hardman's Organizing Activity

Hardman began working the day after his orientation, as an installer. He worked for the Respondent on three sites, but primarily at Plant Bowen.

Hardman testified that he talked about the union with other employees. He said that at one site, there were four employees, all former union members, so there was no necessity to discuss the union with them. At Plant Bowen, Hardman also worked with former union members but he testified there was a helper who had a number of questions about the union, and he discussed it with him. (Tr. 19.) He did not testify about the third site.

Project Manager Woodruff testified that Hardman worked for him on two jobs, World Changers Church and Immaculate Heart of Mary (IHM). (Tr. 65.) Woodruff testified that he never heard Hardman discussing the union, salting or organizing, nor did he hear any rumors about him doing so. (Tr. 65, 69, 70.) Woodruff had four employees at World Changers and six at IHM. (Tr. 66.)

Hardman worked for Foreman Alvin Jackson Jr., at IHM. Jackson testified that he did not observe Hardman engage in any organizing activity, nor did anyone mention any such activity to him. (Tr. 81, 82–83, 85.) Hardman worked at IHM for approximately 7 days. (Tr. 83.) Jackson said that Hardman never discussed the union with him, except to say that he used to work union jobs, but he said nothing about benefits, or whether A & B should be unionized, or complain about the job or any perceived unfairness at A & B. (Tr. 81, 82.)

Hardman worked with Foreman Bruce Jordan on a daily basis, at all three sites but primarily at Plant Bowen, as a two-man crew. (Tr. 93, 98, 148.) Hardman recalled that they worked together every day but one (Tr. 27, 28, 147), while Jordan and General Manager Johnson believed that they worked together every day that Hardman was employed at A & B. (Tr. 88, 98, 117.) It was usually just the two of them at Plant Bowen, although sometimes another employee, Ray Richards, worked with them. (Tr. 87–88.) Jordan and Hardman had worked together on union jobs in 2005/2006. (Tr. 88.) Therefore, while working, they discussed other people they knew who were union members (including Local 85 Organizer James Jackson), places they had worked, how they got the jobs, and what they thought about different people. (Tr. 89.) Jordan testified that, during breaks, all employees sat together, in the same area, and that Hardman was

not trying to salt him or organize anyone else that Jordan saw. (Tr. 92, 93, 99.) Nor did Hardman ever complain about any A & B policies, or about Johnson or Barber, to Jordan's knowledge. (Tr. 93, 94.)

Jordan testified that Hardman complained to him about James Jackson, stating that he was uncomfortable around him and uncomfortable with him calling Hardman at home, trying to get Hardman to organize A & B. (Tr. 89–90, 100.) Hardman told Jordan that he did not want to try to organize A & B, so Jordan advised Hardman to tell Jackson that he was salting, when he was not, so he would leave him alone. (Tr. 90.) Hardman later told Jordan that he had done so. (Tr. 91.) Jordan noted that, toward the end of Hardman's employment, he was more irritated about the situation. (Tr. 103, 104.)

Hardman denied having such conversations with Jordan in which he complained about Jackson. (Tr. 147, 148, 149.) I credit Jordan's testimony. Jordan had no reason whatsoever to fabricate Hardman's statements, while Hardman would be placed in a difficult position vis a vis the union if he admitted complaining about Jackson.

Credibility Findings

For the reasons explained above and below, I find that Hardman is not a reliable witness as to his union organizing activity. Hardman's testimony lacks clarity; he does not even describe engaging in organizing activities. However, I find Woodruff, Alvin Jackson, and Jordan to be credible and therefore I credit their testimony as to their knowledge of Hardman's union organizing activity.

Woodruff's knowledge of Hardman's conversations with other employees was very limited and therefore of no real probative value. Alvin Jackson worked with Hardman for only a brief period, at IHM, and his testimony was similarly of little probative value. Although Hardman testified that he talked to employees (multiple) about the union, I find that testimony disingenuous. Yes, he talked to Alvin Jackson and Jordan about the union, in the sense that they discussed having worked for the union in the past, and Hardman and Jordan talked about people they knew and their past jobs. The only other individual referenced by Hardman was a helper at Plant Bowen, who worked with him and Jordan. He said that individual "had a lot of questions. I discussed it with him." (Tr. 19.) Hardman's testimony on this point was vague and unpersuasive and therefore I give it no credence. Who was the helper? What was the "it" they discussed? I would have expected Hardman to testify to the specifics of the conversation, what questions the individual had, the various benefits of union membership Hardman explained to him, how often they had such conversations, etc. His testimony was completely devoid of anything of the kind. One might assume that Ray Richards is the individual at issue based on Jordan's testimony, but Hardman never named him, and he was not called as a witness.[4] Since the helper was working with Hardman and Jordan, who worked as a team and discussed other union members and past union jobs, he would presumably have heard some of those discussions. For all we know from Hardman's testimony, he might have asked questions about those conversations and about those people and jobs, and not about the benefits of unionization.

[4] I am not drawing any adverse inference from the failure to call the helper as a witness as I do not know who the individual is (Richards or someone else), or whether that individual is a current employee, or is available to testify.

Jordan was a credible witness; he was forthright and consistent. His testimony was enlightening regarding James Jackson's efforts to coerce Hardman into salting A & B, and explains Hardman's actions. Jackson wanted to unionize A & B, through Hardman. He had tried to use David Burgess for such purposes the previous year, threatening to charge him with violation of his contract if he did not agree to salt A & B. (Tr. 74.) Jackson put Hardman in a dilemma. This is reflected in Hardman's complaints to Jordan, when he confided about Jackson pressuring him. As advised by Jordan, Hardman reported to Jackson that he was organizing, when he was not, in order to stay in Jackson's good graces, maintain his chances of being called back to work by the union, and avoid being sued. This was important to Hardman since the A & B job was only temporary. That pressure by Jackson would explain Hardman's falsely asserting not only that he was attempting to organize A & B, but that Johnson and Barber made unlawful statements that they had not.

The evidence, in total, does not support that Hardman engaged in union organizing activities. I find that Hardman did not engage in any union organizing or salting activity while employed at A & B.

D. Letter from the Union

After Hardman advised him that he was salting A & B, Union Organizer James Jackson requested Hardman's permission to advise A & B that Hardman was engaging in union organizing. (Tr. 20.) Hardman agreed, so Jackson sent Barber a letter dated June 20, 2013, to that effect. "Please be advised that employee Thomas J. Hardman, a member of Sheet Metal Workers' Local Union 85 is engaged in organizing activities and is protected under the National Labor Relations Act." (Jt. Exh. 1.)

The parties have differing accounts of what transpired thereafter.

Johnson's and Barber's Versions

On June 22, 2013, Johnson received the letter from Jackson, stating that Hardman was protected by the NLRA due to his organizing activities at A & B. (Tr. 118.) Johnson did not know the purpose of the letter, or what she was supposed to do with that information. First, she called Barber. Neither was aware of any organizing activity by Hardman. They both assumed Hardman would be aware that the letter had been sent and were concerned that Hardman would fear retaliation by A & B, so Barber returned to the IHM site (where he had been earlier in the day), to reassure Hardman. (Tr. 56, 120.) He spoke first with Foreman Alvin Jackson, who said he was unaware of any union organizing activity by Hardman. Barber and Hardman then had a brief conversation, during which Barber tried to assure Hardman that his job with A & B was secure and his continued employment desired. Barber felt that Hardman seemed relieved by his response. (Tr. 52.)

Johnson then called James Jackson, seeking clarification of the letter, to ensure that A & B complied with any applicable rules, because she was unfamiliar with union requirements. However, Jackson did not provide any information and became combative with her, so she terminated the call. (Tr. 120–121, 135.)

She then called Jordan, to inquire whether he had any knowledge of union organizing activities by Hardman. He did not, and said that he assumed Johnson was asking this because she had received a letter from the union. Jordan told Johnson about his earlier conversations with Hardman about his problems with Jackson, and his advice to Hardman, to tell Jackson that he was salting when he was not. Jordan assumed that must have precipitated the letter. (Tr. 121–122.)

Johnson also talked to the two project managers, neither of whom had any knowledge of union organizing activity by Hardman. (Tr. 125–126.)

Johnson then called Hardman, said she had heard about his harassment by the union, and asked whether he was okay. He said he was fine and stated that although he had been pressured, he was not organizing A & B. Johnson told him she was not concerned about whether or not he was organizing, but about the harassment by the union, and offered to give him referrals for assistance in dealing with the union. She did not chastise him for organizing activities. She testified that the line disconnected twice, but both times Hardman called her back. (Tr. 126–127, 137.)

Hardman's Version

Hardman testified that a few days after Jackson called him about sending A & B a letter about his organizing activities, he received a telephone call from Johnson. She was angry and asked why he was organizing after she had directed him not to. (Tr. 21.) He said that the phone connection was lost but he was unable to reach her again. Hardman could not recall having told Johnson that he was not organizing. (Tr. 150.)

Hardman said that he was angry when Barber arrived at the worksite for the second time, and Barber tried to calm him down. He said he told Barber about Johnson's call. (Tr. 30, 32.) Barber told him not to worry about anything, that he was doing good work. (Tr. 32.) Hardman felt, although Barber did not say it in so many words, that when Barber told him not to worry about anything, he meant not to worry about Johnson as well as not to worry about the letter from Jackson. Barber made no mention of union organizing. (Tr. 32–33.) However, Barber testified that Hardman did not mention having talked to Johnson nor did he complain about anything she said. (Tr. 53, 57.) Hardman testified that he told Alvin Jackson about Johnson's comments. (Tr. 31.)

Credibility Findings

Once again, I credit Johnson's and Barber's testimony rather than Hardman's. Johnson and Barber testified credibly, with certainty, and in detail about the events of that day, while Hardman was more vague.

Barber testified that after he left IHM the first time, he stopped at a fast food restaurant for lunch. While he was eating, he received Johnson's call about Jackson's letter. Barber said he was about a mile away from IHM, so the trip back would take only a few minutes. It is hard to believe that after Johnson talked to Barber, and had called James Jackson, Jordan, Woodruff, and Mosley, there was time for her to talk to Hardman as well (including one or two phone disconnections), before Barber arrived back at IHM. She had no reason to talk to Hardman before she

made those calls; Barber was going to go and reassure him. She only called Hardman after learning from Jordan about the pressure Jackson was exerting to organize A & B, to offer him assistance. Hardman did not deny telling Johnson that he had not been organizing; he said he did not recall. (Tr. 150.) Hardman did not explain what he said to Alvin Jackson about Johnson's call or what Jackson's response was. Jackson denied that Hardman complained about his job at A & B, though he was not asked specifically about that phone call with Johnson. (Tr. 82.)

Jordan testified that Hardman was more irritated toward the end of his employment with A & B. That was when Jordan gave Hardman the advice to tell Jackson that he was salting, when Jackson sent the letter to A & B, and when the conversations described above occurred, all placing more stress on Hardman, who likely feared reprisals from A & B but also feared James Jackson. Although Hardman testified he was irritated about lack of supplies and had no problem with Jackson, I reject that testimony.

I find that Hardman told James Jackson, as advised by Jordan, that he was organizing at A & B, when he was not. I find that Jordan reported to Johnson the difficulties Hardman was experiencing with the union as well as the advice he had given Hardman. I find that Johnson called Hardman as she explained, seeking to offer him assistance dealing with the union, and that she was not angry about James Jackson's statement that Hardman was organizing. She told Hardman that she was not concerned about whether he was organizing but she was concerned if he was being harassed by the union. She did not reprimand Hardman for union activity. Johnson had not yet called Hardman when Barber spoke to him, and therefore, as Barber testified, Hardman did not mention any such call to Barber. I find that Hardman told Johnson that he was not organizing A & B.

E. Termination of Hardman's Employment

Hardman testified that James Jackson called him at work on June 25[5] and offered him his old union job at McKenney's, which paid better than A & B. Jackson also advised him he could leave A & B under an unfair labor practice strike, so he could easily return to A & B in the event he was laid off from the McKenney's job. (Tr. 22.) Therefore, that evening Hardman sent the following email to Johnson:

> I, Thomas "T.J." Hardman, am going on an Unfair Labor Practice Strike in protest of the Unfair Labor Practices of your company on behalf of myself and fellow workers. Though I am not actively picketing on an everyday basis, I remain on strike.

(Jt. Exh. 2.)

Hardman testified that Jackson did not advise him what language to use in that email, but that he composed the email himself. (Tr. 33.)

Johnson was confused by the email, based on her last conversation with Hardman and what she had been told by the project managers and foremen. (Tr. 129.) She called Hardman

[5] Throughout the hearing, witnesses were often confused about what day of the week was involved. I note that June 25, 2013, was a Tuesday.

but was unable to reach him, so she left a voice mail message asking for an explanation of the email. (Tr. 131.) He did not return that call. (Tr. 38, 131.)

Hardman testified that, in that voice mail message, Johnson advised him for the first time that he was a temporary employee. (Tr. 22, 23.)

Johnson then called Jordan, the foreman who had been working with Hardman that day. He reported that Hardman had not said anything about going on a strike, but had generally behaved normally. He did state, however, that at the end of the day, Hardman told him that "James has got something cooking." (Tr. 130.) Jordan told her that Hardman had declined to explain.

Finally, Johnson called the two project managers, but neither had heard anything about Hardman going on strike. (Tr. 130.)

The next day, June 26, when Hardman did not report to work or return her call, Johnson called him again and left another voice mail message. (Tr. 131.) Hardman, however, had called Jordan, his foreman, to advise him that he would not be returning to work. (Tr. 39.) Jordan testified that Hardman told him that he would not be returning because the union had called him back to work at McKenney's. (Tr. 91, 95.) Hardman said nothing to Jordan about a strike. (Tr. 95.) Hardman, however, initially testified that he only recalled having told Jordan in earlier conversations that he had worked at McKenney's in the past. He did not deny telling Jordan that he was returning to work at McKenney's, but said he did not recall telling him that. (Tr. 149.) Then he equivocated and said maybe he did say that. (Tr. 149, 153–154.) After being confronted with his affidavit, he admitted that he had told Jordan he was returning to McKenney's. (Tr. 155.)

Jordan reported to Johnson that Hardman had quit, that he was not on strike. (Tr. 95–96, 102, 132). Jordan told her that Hardman's assertion that he was on strike was James Jackson's way of flexing his muscles. Johnson therefore responded to Hardman's email that A & B accepted his resignation. "A & B acknowledges your resignation and wishes you well in all of your future endeavors." (Jt. Exh. 2; Tr. 132–133.)

Hardman did not respond to that email and has not contacted A & B again, either to state that he did not quit or for any other reason. (Tr. 23.) He started working at McKenney's on June 26, 2013. (Tr. 37.)

III. LEGAL STANDARDS AND ANALYSIS

A. Prohibition Against Organizing or Discussing the Union

The Respondent has no official work rules prohibiting engaging in activities protected by Section 7. However, it is alleged that Johnson told Hardman on two occasions that salting and organizing were prohibited, and that Barber likewise told Hardman that salting and organizing were prohibited. It is also alleged that Johnson told Hardman not to tell other employees that he was a union member.

It is well-established that an employer's maintenance of an overbroad rule violates the Act if it reasonably tends to chill employees in the exercise of their Section 7 rights. *Continental*

Group, Inc., 357 NLRB No. 39 (2011); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). If the rule explicitly prohibits Section 7 activities, it is unlawful. *Lutheran Heritage,* supra. Further, it is well-settled that "[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.,* 124 NLRB 146, 147 (1959).

There is nothing in this record other than Hardman's perfunctory and uncorroborated testimony to support this allegation. Although the General Counsel contends that the Respondent has zero tolerance for union organizing, he has utterly failed to support that. While the company preferred to remain nonunion, it, through Johnson, hired many known union members, including Hardman. Johnson advised Hardman that no solicitation of any kind was permitted during work hours or on the A & B premises, and that it was not limited to union organizing. She did not tell him not to organize or salt, nor did she advise him not to tell other employees of his membership in the union. Rather, she told him that he was free to do what he wanted during breaks, lunch, and before or after work. Likewise, Barber did not say anything to Hardman about, nor prohibit, salting or organizing. He simply stated that the company was nonunion and he wanted it to stay that way. Further, there is no evidence that Johnson or Barber ever told any other employee that salting or organizing was prohibited. On the contrary, Jordan and Burgess, who were both union members when hired, testified that no such statements were made to them. (Tr. 76, 96–97.)

Under Section 8(c) of the Act, employers and supervisors may openly express antiunion sentiment without committing an unfair labor practice provided their statements contain no threat of reprisal or force or promise of a benefit. See 29 U.S.C. Sec. 158(c). *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (an employer's free speech right to communicate his views to his employees is firmly established and may not be infringed by a union or the Board); *Poly-America, Inc.*, 328 NLRB 667, 669 (1999) (the respondent did not violate the Act when it informed employees that the union was no good, had threatened to burn the plant facility, and would charge up to $300 in weekly or monthly fees because such comments failed to contain any threats of reprisal or promise of benefits); *Tecumseh Corrugated Box Co.*, 333 NLRB No. 1, 7 (2001) (it is well-settled that absent a threat of reprisal, promise of benefit, or other coercion, an employer is free under Section 8(c) of the Act to express its views on whether employees should choose a labor organization to represent them, or to express its preference for one union over another, or whether they should choose any labor organization to represent them). Section 8(c) states that noncoercive expressions of opinion are not to be used as evidence of an unfair labor practice under any provisions of the Act. Barber's statement to Hardman that he wants the company to stay nonunion is a statement of personal opinion that contains no threat and no coercion, either explicit or implicit. It is, therefore, permissible and not a violation of the Act.

Since Johnson and Barber did not make the statements as alleged, and Barber's statement is permissible, I find that the Respondent neither promulgated nor maintained rules prohibiting employees from discussing the union or engaging in organizing activities.

This allegation is dismissed.

B. Termination of Hardman's Employment

The legal standard for evaluating whether a motive-based adverse employment action violates Section 8(a)(3) and (1) of the Act is set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983) (approving the *Wright Line* analysis). Under *Wright Line,* the elements generally required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's union or protected activity. *Consolidated Bus Transit, Inc.,* at 1066; *Pro-Spec Painting,* 339 NLRB at 949; *Williamette Industries*, 341 NLRB 560, 563 (2004).

Protected Activity

First, I have found that Hardman did not engage in any union organizing activity. As I explained above in section II.C of the findings of fact, Hardman's testimony on this point was unpersuasive, and it was uncorroborated. Jackson's June 20 letter, asserting that Hardman was engaged in organizing activities, does not make it fact. The evidence does not support that Hardman engaged in any organizing activities during his employment with A & B.

Next, I turn to Hardman's purported unfair labor practice strike. Hardman notified Johnson that he was going on strike but gave no explanation for it. He had never made any complaints about any terms and conditions of employment at A & B to anyone in management, nor had he complained about anything to the foremen or to any other employee. (Tr. 117.) Hardman did not respond to Johnson's telephone calls seeking information about the strike. Moreover, after he ceased working, he never set up a picket line, even for the briefest period of time (nor did James Jackson or anyone else from the union on his behalf). Rather, the day after he stopped working for A & B, he started his new job at McKenney's.

Hardman's stated reason for striking was the statements made by Johnson at his interview and orientation some 6 weeks earlier, at his hire, prohibiting salting and organizing. (Tr. 42.) However, I have found she did not make those statements. If the alleged conduct did not occur, it does not constitute an unfair labor practice. There can be no unfair labor practice strike without an unfair labor practice having occurred in the first instance. *Basic Industries, Inc.,* 348 NLRB 1267, 1274 (2006).

Further, no other employee had ever complained to Hardman of such statements by Johnson. Hardman could not cite any other employee to whom Johnson had allegedly made similar statements. (Tr. 36–37.) Therefore, I can only conclude that there are no other employees on whose behalf he was purporting to strike, despite his assertion otherwise in his email to Johnson. (Jt. Exh. 2.) Moreover, there is no evidence whatsoever that any other employee supported Hardman's strike, or had ever discussed a strike with him, or was even aware of his plan. In *Mannington Mills, Inc.,* 272 NLRB 176 (1984), there was no concerted activity where there was no evidence that any other employee had authorized or instructed the charging party to take ac-

tion (threaten a work stoppage), had ever discussed the possibility of such action, or was aware of and supported the action. Therefore, it was found that the employee's activity was not protected. Similarly, Hardman's action in declaring a strike was not concerted, as none of those criteria are met.

Therefore, I find that Hardman's strike was not an unfair labor practice strike.

The General Counsel is correct that notifying an employee that he has voluntarily quit after receiving his strike notice is tantamount to terminating his employment for striking and is therefore a violation. However, that is not the situation here, as I have determined this was not an unfair labor practice strike. In *Controlled Energy Systems*, *Inc.,* 331 NLRB 251, 252 (2000), which the General Counsel cites, the employees had in fact gone on an unfair labor practice strike. The General Counsel's reliance on *Mathis Electric Co.,* 314 NLRB 258 (1994), is also misplaced. In *Mathis*, the charging party was undeniably involved in organizing activities; he was a salt, and he responded to employees' complaints about various terms and conditions of their employment. Although he refused to explain to his employer what an unfair labor practice strike was, and did not cite any complaints, the day following his announcement of the strike, he and two others from the union set up a picket line. He was then given his final paycheck and told that he was fired, and threatened with arrest if he returned to the property. That bears no resemblance to Hardman's situation.

The instant case is more akin to *DeMuth Electric, Inc.,* 316 NLRB 935 (1995), where the employee was determined to have voluntarily quit. He said he was going on strike, then accepted another job, and never contacted the employer again. Unlike the employees in *Modern Iron Works, Inc.*, 281 NLRB 1119 (1986), who explicitly stated that they did not quit, Hardman told his foreman that he was quitting because he had another job, and he did not reply to Johnson's email accepting his resignation. The employees in *Centurion*, 304 NLRB 1104 (1991), were also found not to have quit. However, unlike Hardman, they had registered complaints about various working conditions, both before they engaged in a walkout and then after they returned to work to discuss the situation with management.

Therefore, I find that Hardman voluntarily quit his job at A & B. He had already accepted another job, as he told Jordan. He never picketed, he never gave any explanation for a strike, he protested nothing, and he made no demands or complaints, as he had none, either on his own behalf or on behalf of other employees.

In summary, Hardman did not engage in union organizing activity, he did not go on an unfair labor practice strike as there were no unfair labor practices, and he voluntarily quit his job at A & B.

I find that it was reasonable for Johnson, under these circumstances, where Hardman did not return her phone calls seeking an explanation for his email regarding going on strike but rather told Jordan that he had taken another job, to consider Hardman a voluntary quit and to accept his resignation.

As Hardman engaged in no union or protected concerted activity, management could have no knowledge of such activity or harbor any animus toward Hardman for such activity.

None of the three *Wright Line* elements are met. I find, therefore, that the General Counsel has not established a prima facie case.

This allegation is dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 14, 2014

Susan A. Flynn
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.